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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

DOCKET NO. 377

JOSEPH LANZA and SYLVESTER COSENTINO,
Petitioners,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, individually and as chairman, ARNOLD BAUMAN, individually and as chief counsel,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Court of Appeals wrote four opinions, one for the majority and three separate opinions by the dissenting judges. They are reported in 3 N. Y. 2d 92 and are printed in Appendix A to the petition.

The Appellate Division wrote an opinion reported in 2 App. Div. (2) 531 and printed in the record (R. 12).

Special Term wrote an opinion reported in 5 Misc. (2) 324 and printed in the record (R. 12).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Would the proposed action of the respondent, a joint legislative committee of the New York Legislature, to make a part of its record at a public session a tape recording and transcript, now in its possession, but made without the knowledge or participation of the committee, of an alleged private conference between the petitioners, assuming them to have been attorney and client, while the latter was in a local jail awaiting a determination as a parole violator, deprive him, the assumed client, of his constitutional right to the process by denying him his right to counsel and his privilege against self-incrimination?

2. May the respondents, an arm of the New York Legislature, one of the three co-ordinate branches of the State government, be enjoined by the courts from this proposed action?

Constitutional Provision Involved

The due process provision of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

The New York State Joint Legislative Committee on Government Operations was duly created in 1955 by the Legislature of the State of New York to investigate and examine into the management of any State department,

board, bureau, commission or other agency of the State and was empowered to make studies of the operations of State government to determine their efficiency and effectiveness, and to detect and prevent unsound, improper and corrupt practices.

In March 1957 the committee undertook to inquire into the way parole is administered in the State of New York and, in addition, to investigate the facts and circumstances concerning the arrest of petitioner Lanza for parole violations and his subsequent restoration to parole by decision of a member of the State Board of Parole in order to determine whether improper or corrupt considerations had influenced that decision.

While Lanza was in the Sheriff's Westchester County Jail in February 1957 awaiting the outcome of the parole violation charges, the jailers made a recording of a conversation between him and the petitioner Cosentino, a lawyer. This occurred only once although Cosentino visited and talked with Lanza at the jail on several occasions (Respondents' Brief, App. B, p. 5a, par. 7).

In the course of the committee's investigation which was commenced subsequent to Lanza's release from jail and restoration to parole, the committee learned of and came into possession of a copy of the recording.

Upon the commencement of public hearings by the committee on April 29, 1957, the petitioners obtained a temporary injunction in the Supreme Court of the State of New York, Special Term, against the committee's public use of the recording or transcripts thereof; at the same time the respondents' motion to dismiss the petitioners' complaint was dismissed (R. 12). There was no suggestion in the petitioners' complaint that the committee was acting outside of its jurisdiction or in excess of its authority or

that the information contained in the recording was not relevant to the subject under inquiry. (See also Opinion of Court of Appeals, Petition, App. A, p. 3a.) The complaint itself acknowledged the due creation and authorized powers of the committee (R. 7, Complaint).

Thereafter upon appeal by the respondents to the Appellate Division of the Supreme Court, the order granting the temporary injunction was reversed and the complaint was dismissed (R. 19, 21).

Thereafter the Court of Appeals by a four to three vote affirmed the judgment of the Appellate Division (Petition, App. B).

Consideration of Constitutional Point by State Courts

Special Term, in granting the temporary injunction, held that the recording of the conversation violated Lanza's right to counsel, finding that the relationship of lawyer and client had existed at the time of the conversation although three parole officers submitted affidavits to the court that Lanza had told them on several occasions while in custody on the parole violation charges that Cosentino was not his lawyer. (R. 12-16; Respondents' Brief, App. B.)

The Appellate Division in reversing Special Term, stated (opinion of App. Div., R. 26):

> "Nor does the right to a fair trial or the constitutional right to counsel with reference to Mr. Lanza become involved. Consequently, neither the tape recordings nor transcripts thereof are precluded from use by any existing rule or provision of law."

The remittitur of the Court of Appeals contains the following statement (Certificate of Court of Appeals, App. C, Petition):

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant Lanza contended that respondents' threatened use and divulgence of the recording of Lanza's conversation with his attorney, which use and divulgence are sought to be enjoined in this action would deprive him of due process under the Fourteenth Amendment. The Court of Appeals held that the action said to be threatened by respondents, a lawfully constituted legislative investigating committee, would not in this case deprive appellant Lanza of his constitutional right to due process."

Argument

The petitioners contend that Lanza had the right to counsel while in jail and that that right *would* be defeated by permitting the State Legislature, through its duly authorized committee, to make use of the alleged wrong committed by the county jailers. They also contend that such action by the committee would also defeat Lanza's privilege against self-incrimination. Finally, the respondents argue that, having established a violation of a constitutional right "by the recordings and the threatened use of them" the court may enjoin the contemplated legislative use. (Petition, pp. 17, 18.)

Throughout their argument the petitioners couple the act of recording with the proposed use of it by the committee. Assuming, *arguendo*, that the act of recording did constitute a violation of Lanza's right to counsel, nevertheless that act should not result in the prohibition of its use where no rights of the petitioners are at issue.

The law is clear that denial of the right to counsel in a criminal action or administrative proceeding directed against a defendant is a deprivation of due process. But the instant proceeding is a legislative inquiry not directed against Lanza. His constitutional rights will not be affected by the committee's use of the recording. Should the committee's use of it ever result in a criminal action against him, he has an adequate legal defense both under the law of New York and the decisions of this court. Moreover, there is some doubt whether Lanza, in jail awaiting a determination on a charge of violation of parole, was entitled to counsel under the Correction Law of New York. (Respondents' Brief, App. A.)

Further, the act of recording does not actually involve the privilege against self-incrimination. That privilege provides a prohibition against testimonial compulsion and not against the obtaining of evidence by other means. This court has held that this privilege, which is a constitutional guarantee of the Fifth Amendment, does not apply to the states by way of the Fourteenth Amendment.

Finally, it is well established that the courts will not interfere with the conduct of the legislative branch of its own business so long as the bounds of power and pertinency are not exceeded.

The issue is, simply and narrowly, may the committee use the recording in its public record?

It is submitted that the decision of the Court of Appeals in the instant matter is in consonance with the decisions of this court and that the petitioners' claim of violation of due process is not demonstrable.

The Proposed Action of the Committee Would Not Deprive Petitioner Lanza of His Constitutional Right to Due Process

The petitioners seek to enjoin the committee from making a part of its record at a public session the tape recording and transcript, now in its possession, of a conversation between them while the petitioner Lanza was in a local jail awaiting the outcome of a Parole Board investigation which would determine whether or not he had violated the conditions of his parole. There is no contention that the committee instigated or was in any way involved in the recording of the conversation (Cf. *Hearst* v. *Black*, 87 F. 2d 68, discussed, *infra*, at pp. 15, 16, in which a Senate committee instigated an illegal seizure of evidence by another agency of the government.) Yet the petitioners, claiming that the jailers who made the recording and the committee are both part of the same "sovereignty", argue that both are in *pari delicto* and to permit the committee to use the recording would make "a mockery of reality." (Petition, pp. 17, 18.)

As a matter of reality the committee, legally empowered to inquire into procedures and corruption in any agency of the State of New York, is concerned presently with the manner in which parole is handled in this state (opinion of Appellate Division, R. 26). In addition, although the recordings came into the hands of other public agencies, including the Board of Parole and the Commissioner of Investigation, a member of the executive branch of the state government, who conducted a like parole simultaneously with this committee, the petitioners singled out the committee to restrain but made no effort to restrain the Commissioner or the Board of Parole. (Opinion of Appellate Division, R. 25, 26.)

The petitioners have cited a number of cases which they claim support their assertion that a violation of due process against Lanza would result if the committee makes the recording a part of its record. (Petition, pp. 10-12; *People* v. *Cooper*, 307 N. Y. 253, cert. denied 348 U. S. 878; *Matter of Fusco* v. *Moses*, 304 N. Y. 424; *People* v. *Decina*, 2 N. Y. 2d 133; *Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444; *Glasser* v. *United States*, 315 U. S. 60; *Coplon* v. *United States*, 191 F. 2d 749, cert. denied 342 U. S. 926; *Caldwell* v. *United States*, 205 F. 2d 879; *In re Bull*, 123 F. Supp. 389.) An examination of these cases reveals that in every instance the individual complaining of a violation of due process resulting from denial of the right to counsel, was a party to a proceeding, to wit, the defendant in a criminal action or administrative proceeding. In the instant matter, a legislative inquiry, Lanza is not a party and none of his rights will be affected by its action.

Moreover, a consideration of the law both state and federal indicates that Lanza has little, if anything, to fear, as a result of the recording whether or not the committee makes its proposed use of it. The Appellate Division in holding that since the information contained in the recording is in the hands of a number of public agencies and cannot now be retrieved, stated:

> "This does not mean, however, that the confidential communications thus obtained may be used against Mr. Lanza in any proceeding in which he is the target. Indeed, they may not", citing *People* v. *Cooper*, 307 N. Y. 253, cert. denied 348 U. S. 878, *supra* and *Coplon* v. *United States*, 191 F. 2d 749, cert. denied 342 U. S. 926, *supra* (R. 26).

Similarly, the Court of Appeals stated:

> "It is clear that if such interference had occurred in connection with a proceeding directed against Lanza, any resulting determination would be annulled by the courts on the ground that the interference with the right to counsel had destroyed his constitutional right to a fair trial," citing *Matter of Fusco* v. *Moses*, 304 N. Y. 424, *supra; People* v. *McLaughlin*, 291 N. Y. 480; *Caldwell* v. *United States*, 205 F. 2d 879, *supra; Coplon* v. *United States*, 191 F. 2d 749, *supra*, and *People* v. *Cooper*, 307 N. Y. 253, *supra*. (Petition, pp. 4a, 5a.)

As illustrative of this point is a recent proceeding in which the Commissioner of Investigation of the State of New York sought to have Sylvester Cosentino, the same individual who is a petitioner herein, adjudged guilty of contempt for refusing to answer questions about matters connected with Lanza's parole. The respondent Cosentino was not asked about the words of his conference with Lanza, contained in the recording, but was asked questions based on and reflecting the recording. The Appellate Division—the same court which has ruled that there is no constitutional right involved in the instant matter (R. 26)—sustained Special Term in refusing to adjudge the respondent Cosentino guilty of contempt. It held that he could not properly be interrogated about facts learned from the recording. *Matter of Reuter* v. *Cosentino*, 4 App. Div. (2) 252.

It would thus appear that the petitioner Lanza cannot be prosecuted or suffer any penalty resulting from information secured in the recording and that the petitioner Cosentino cannot be compelled to testify to any matter reflecting that information.

The committee's position cannot be stated better than by quoting from the opinion of the Court of Appeals in the instant case (Petition, p. 5a):

> "Here it is not claimed that the recording will be used in connection with any action or proceeding directed against Lanza—we merely have a legislative investigation and its findings are binding on no one. Lanza's right to a fair trial is in no wise being infringed upon since there is no trial, present or prospective. None of his property rights is involved. Consequently the use and disclosure of the communication, unconnected with any proceeding directed against Lanza, as distinguished from the act of recording, is not a basis for an injunctive action."

It is not the law, as indicated by petitioners' argument that the right to counsel is paramount and any interference with it should result in unlimited consequences. In the recent case of *In re Groban*, 352 U. S. 330, 1 Law. Ed. (2) 376, this court held that the denial of counsel to a witness at an investigation being conducted by the Fire Marshal of the State of Ohio, was not a deprivation of due process under the Fourteenth Amendment. In this case following a fire which had occurred on premises of a corporation owned and operated by the appellants, the Fire Marshal subpoenaed the appellants to an investigation conducted by him but refused to permit appellants' counsel to be present during their testimony. Thereupon the appellants refused to testify. They were adjudged guilty of contempt and jailed. In affirming the judgment of conviction this court stated (p. 354):

> "The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with

so weighty a public interest as fire protection to protect, we cannot hold that the balance has been set in such a way as to be contrary to 'fundamental principles of liberty and justice.'"

Of similar result in the consideration of the due process clause of the Fourteenth Amendment have been the decisions of this court in *Adamson* v. *California*, 332 U. S. 46; *Wolf* v. *Colorado*, 338 U. S. 25, and *Stefanelli* v. *Minard*, 342 U. S. 117. In the *Adamson* case, this court, upholding a conviction for murder in the first degree in a court of the State of California, held that the privilege against self-incrimination as contained in the Fifth Amendment did not apply to the states, that the privilege is not inherent in the right to a fair trial and is therefore not on that basis protected by the due process clause of the Fourteenth Amendment. At issue was the constitutionality of the California law which permits the failure of a defendant to explain or to deny evidence against him to be commented upon by court and by counsel and to be considered by the jury. In arriving at its decision, this court assumed that a like statute in federal prosecutions would violate the Fifth Amendment.

In connection with a consideration of the privilege against self-incrimination, it should be noted that this privilege pertains to testimonial compulsion and not, as suggested by the petitioners, to the obtaining of evidence by other means, even if illegal. *People* v. *Defore*, 242 N. Y. 13; *Adams* v. *New York*, 192 U. S. 585, 597.

In the *Wolf* case, this court refused to set aside a conviction in a state prosecution in which illegally obtained evidence, the fruits of an illegal search and seizure, was admitted, holding, in conformity with the *Adamson* case, that the Fourth Amendment did not apply to the states

and was not imposed on them through the Fourteenth Amendment even though upon similar facts in a federal prosecution a conviction would be upset. And in the *Stefanelli* case, this court refused to enjoin the use of illegally obtained evidence in a pending state prosecution.

The *Wolf* case, despite the petitioners' contention that it concerned "the question of admissibility alone" (Petition, p. 16), stands, along with the *Adamson* and *Stefanelli* cases, for the proposition that this court will not upset a conviction in a state court predicated upon illegally obtained evidence even though it would not countenance similar conduct by Federal officials. *A fortiori*, this court should not interfere with the use of evidence in a legislative inquiry even if it believes that the evidence was illegally obtained.

The instant case does not involve the type of conduct which this court condemned as brutal in *Rochin* v. *California*, 342 U. S. 165. In that case, three state officers, acting upon information that the petitioner was selling narcotics, entered his home and forced their way into the bedroom occupied by him and his wife. When asked about two capsules lying on a bedside table, petitioner put them in his mouth. After an unsuccessful struggle to extract them by force, the officers took the petitioner, handcuffed, to a hospital, where an emetic was forced into his stomach through a tube against his will. As a result of the stomach pumping he vomited out the two capsules which were found to contain morphine. At the trial in a state court these were admitted in evidence over his objection and he was convicted of violating a state law forbidding possession of morphine. This court reversed the conviction because it was obtained by methods violative of the due process clause of the Fourteenth Amendment.

In commenting upon the assault and torture which the petitioner had suffered, this court stated (p. 172):

> "This is conduct that shocks the conscience. • • • They are methods too close to the rack and the screw to permit of constitutional differentiation."

However, the court made it clear that its conclusion was based on the unusual facts of the case and that it was not overruling precedent in this field. The court stated (p. 175):

> "In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems. We therefore put to one side cases which have arisen in the State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book. It does not fairly represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record • • • ."
>
> • • • •
>
> "On the facts of this case the conviction of the petitioner has been obtained by methods that offend the Due Process Clause. The judgment below must be Reversed."

The *Rochin* case clearly dealt with an outrageous throwback to medieval practices of physical brutality. To attempt to equate such conduct with the instant case as an "invasion of privacy" (Petition, p. 16) is to ignore the plain language quoted above.

Although both the Appellate Division and the Court of Appeals have assumed Lanza's right to counsel in the instant matter, it is not clear if they considered the dif-

ference between a prisoner in jail awaiting a criminal trial and a prisoner in jail awaiting a decision on a question of parole violation. Sections 216 and 217 of the New York State Correction Law (Respondents' Brief, App. A) provide for retaking a paroled prisoner when his parole officer has reasonable cause to believe that the prisoner has violated his parole. Section 218 (Respondents' Brief, App. A) provides that the board of parole shall declare the prisoner delinquent and subsequently hold a parole court, to consider the case, at which the prisoner "shall be given an opportunity to appear personally, *but not through counsel or others,* before such board of parole and explain the charges made against him." (Emphasis supplied.)

Counsel is not aware of any case in New York in which the constitutional aspect of the denial of counsel pursuant to section 218 of the Correction Law has been considered. However, in *Escoe* v. *Zerbst,* 295 U. S. 490, this court stated (p. 492):

> "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."

In *Fleming* v. *Tate,* 156 F. 2d 848, the court construed the federal statute on parole violation hearing to mean that the prisoner may have counsel at such a hearing if he so elects, but stated (p. 849):

> "No constitutional right is involed, as parole is a matter of grace."

The Courts are Without Power to Restrain a Legislature Acting Within its Constitutional Power of Inquiry Upon Matters Relevant Thereto.

Applying the doctrine of separation of powers under which our governments, both state and federal, operate, the courts have consistently declared that they lack the authority to enjoin the legislative branch of the government in the latter's exercise of its constitutional functions. *Hearst* v. *Black*, 87 F. 2d 68; *Nelson* v. *United States*, 208 F. 2d 505, 513, cert. denied 346 U. S. 827; *Barsky* v. *United States*, 167 F. 2d 241, 250, cert. denied 334 U. S. 843; *People ex rel. Bender* v. *Milliken*, 183 N. Y. 35; *Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1. Equally well established is the proposition that the power of inquiry generally exercised on behalf of the legislature by its committees, is an essential auxiliary to the constitutional legislative function. *McGrain* v. *Daugherty*, 273 U. S. 135, 174 *et seq.*; *Matter of Joint Legislative Comm. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1, *supra*.

In *Hearst* v. *Black*, *supra*, the Federal Communications Commission acting on the request of a Senate committee investigating lobbying, illegally seized copies of telegrams from a telegraph company's office and turned them over to the committee. The court in sustaining the district court's refusal to restrain the committee "from keeping the messages or making any use of them or disclosing their contents", although it acknowledged the existence of property rights in the telegrams and the power of a court of equity to enjoin such a trespass whether by private or governmental persons, held that to enjoin the committee from the use of the information in its possession

would be an invasion of the legislature's independence, that a court of equity has no authority to restrain the latter acts, adding (p. 71) that the universal rule "is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference."

In *Nelson* v. *United States, supra,* certain documents which had been illegally obtained from the defendant's home by an employee of a Senate committee, were subsequently turned over to the United States Attorney and used as evidence in the trial of the defendant for operating a lottery in violation of the District of Columbia lottery law. Although the court set aside the conviction because the acts complained of constituted an illegal seizure of evidence, the Senate employee having acted without a search warrant, it reiterated the principle of *Hearst* v. *Black, supra,* stating (p. 513):

> "Though a court can no more enjoin a congressional committee from making an unconstitutional search and seizure than it can enjoin Congress from passing an unconstitutional bill (citing *Hearst* v. *Black*), a court does have the power and duty to deny legal effect in an action before it."

In *Barsky* v. *United States,* 167 F. 2d 241, *supra,* the court in upholding the conviction of the defendant for having failed to produce records subpoenaed by the House Un-American Activities Committee, held it could not review the conduct of members of the committee, stating (p. 250):

> "The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded (citing *McGrain* v. *Daugh-*

> *erty*, 273 U. S. 135, *supra*) and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power' ".

Similarly in *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (D. Nev.), the District Court refused to enjoin a Senate subcommittee and the Public Printer from printing and distributing a document characterizing the plaintiff as a Communist front, an alleged libel. As to the Senate committee, the complaint was dismissed "for lack of jurisdiction" on the authority of *Hearst* v. *Black*, 8 F. 2d 68, *supra*.

The New York courts are in accord with the principles enunciated in the preceding federal cases. In *Matter of Joint Legislative Comm. to Investigate State Educ. System [Teachers Union]*, 285 N. Y. 1, *supra*, the Court of Appeals in upholding an adjudication of the defendant for contempt for failure to produce subpoenaed records before a joint legislative committee, stated (p. 8):

> "" • • • The same principle which renders it the duty of the courts to hold legislative action illegal when it unduly encroaches upon the province of the judiciary, forbids interference by the latter with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers' ". (Quoting from *People ex rel. McDonald* v. *Keeler*, 99 N. Y. 463.)

A similar conclusion was reached in *People ex rel. Bender* v. *Milliken*, 185 N. Y. 35, *supra*, in which the court sustained the authority of the State Civil Service Commission, conferred by statute, to hold inquiries and to subpoena witnesses in connection therewith for the purpose of reporting to the Governor on the operation of the Civil Service Law. The court stated (p. 40):

> "The function so performed by the commission is strictly analogous to that of a legislative committee of inquiry or investigation. It is not a valid objection to such an investigation that it may disclose crime or wrongdoing on the part of the individuals, provided its object is the fra[illegible]ng and enactment of proper laws or regulations.

In conformity with the preceding principles the Court of Appeals in the instant case, 3 N. Y. 2d 92, stated (Petition, p. 5a):

> "No contention is made that the information sought to be used is not relevant to this purpose, and in such case the judiciary would be usurping authority if it enjoined the legislative branch of our government, in the exercise of its constitutional functions, from using and making a part of its public record the information from the recording involved here", citing *Hearst* v. *Black*, 87 F. 2d 68, *supra; Nelson* v. *United States*, 208 F. 2d 505, cert. denied 346 U. S. 827, *supra; Barsky* v. *United States*, 167 F. 2d 241, *supra; Matter of Joint Legislative Com. to Investigate State Educ. System* [*Teachers Union*], 285 N. Y. 1, *supra*

The petitioners in their brief contend that the courts have the power to enjoin the legislature, which the Court of Appeals has held they do not, and have cited a number of cases in support of their contention. (Petition, pp. 17-20.) *Youngstown* v. *Sawyer*, 343 U. S. 579, cited for the proposition that this Court has enjoined the President of the United States (Petition, p. 18) holds that the President, in directing his Secretary of Commerce to seize the steel mills, was acting beyond his constitutional or statutory powers and was, in effect, attempting to create a power that only the Congress had power to create by legis-

lation. Similarly, in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (Petition, p. 19), this Court held that a law which authorized the President to regulate certain trade by executive order "without standard or rule" committed to him "the functions of a legislature rather than those of an executive or administrative officer" and therefore was unconstitutional. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, and *Work* v. *Louisiana*, 269 U. S. 250 (Petition, p. 19), cabinet members were enjoined by this Court because their actions had exceeded the scope of the authority conferred on them by executive orders.

The petitioners further contend that the courts may exercise the power to restrain even without affirmative authority granted to them, citing *Watkins* v. *United States*, 354 U. S. 178, 1 L. Ed. (2) 1273, and *Jurney* v. *MacCracken*, 294 U. S. 125 (Petition, p. 19). An examination of these cases, it is submitted, fails to support such a conclusion. In the *Watkins* case, this Court reversed the conviction of the defendant for contempt of Congress under Section 192 of 2 U.S.C. holding that it was incumbent upon the investigating committee to state for the witness the pertinency of the question propounded to the subject under inquiry. The court stated that since Congress had invoked the aid of the federal judicial system in protecting itself against contumacious conduct, the court must accord to the defendants every right guaranteed in all criminal cases. Mr. Justice Frankfurter in a concurring opinion wrote (p. 215):

> "By thus making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prose-

> cution of offenses and those implied restrictions under which courts function."

In *Jurney* v. *MacCracken, supra*, cited by the petitions as "an additional authority to sustain the principle that the judiciary may intervene against anyone including a House of Congress when claim is made of the denial of a constitutional right" (Petition, p. 19), this Court sustained the Supreme Court of the District of Columbia which had discharged a writ of habeas corpus issued against Jurney, Sergeant-at-Arms of the Senate and had dismissed the petition brought by MacCracken who had been cited by the Senate to show cause why he should not be punished for contempt of that body. In upholding the Senate's power to enforce its authority by arrest and punishment, this Court stated (p. 152):

> "The contempt with which MacCracken is charged is 'the destruction and removal of certain papers.' Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposed to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of *habeas corpus* is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes."

The remaining cases cited by Petitioners on the point of this Court's power to enjoin the legislature (Petition, pp. 18-20) involve instances in which executive officers had exceeded their authority, had committed unconstitutional acts or had attempted to enforce unconstitutional laws. (*Sterling* v. *Constantin*, 287 U. S. 378; *Hague* v. *CIO*, 307 U. S. 496; *Ex parte Young*, 209 U. S. 123; *Brown*

v. *Board of Education*, 347 U. S. 483; *Pauchogue Land Corp.* v. *State Park Commission*, 243 N. Y. 15.)

In the instant case it is not disputed that the committee hearings are being conducted in furtherance of a legitimate legislative object by express authorization of the Legislature itself pursuant to law and that the information the committee seeks to make a part of its record is within the scope of its inquiry. (See opinion of Court of Appeals, Petition, Appendix A, pp. 3a, 5a.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ARNOLD BAUMAN,
BERTRAM D. SARAFAN,
Counsel for Respondents.

APPENDIX A

New York Correction Law:

"§216. Violation of parole.

If the parole officer having charge of a paroled prisoner or a prisoner received under the uniform act for out-of-state parolee supervision shall have reasonable cause to believe that such prisoner has lapsed, or is probably about to lapse, into criminal ways or company, or has violated the conditions of his parole in an important respect, such parole officer shall report such fact to a member of the board of parole or to any officer of the division of parole designated by such board, who thereupon shall issue a warrant for the retaking of such prisoner and for his temporary detention or return to a designated prison. The retaking, detention or reimprisonment of any such prisoner may be further regulated by the rules of the board not inconsistent with this article. Such warrant shall constitute sufficient authority to the peace officer to whom it is issued and to the superintendent or other person in charge of any jail, penitentiary, lockup or detention pen to whom it is exhibited to hold in temporary custody the prisoner retaken pursuant thereto. As amended L. 1945, c. 678, §2; L. 1954, c. 1952, §1, eff. July 1, 1954."

"§217. Retaking of a violator of parole.

Any parole officer or any officer authorized to serve criminal process, or any peace officer to whom such warrant shall be delivered is authorized and required to execute such warrant by taking such prisoner and having him detained or returning him to the prison designated by the commissioner of correction, to be held to await the action of the board of parole. * * *"

Appendix A

"§218. Board of parole to act on violations of parole. Whenever there is reasonable cause to believe that a prisoner who has been paroled by the state board of parole, has violated his parole, such board of parole at its next meeting shall declare such prisoner to be delinquent and time owed shall date from such delinquency. The warden of each prison and the superintendents of the other institutions named in section two hundred and ten of this article, shall promptly notify the state board of parole of the return of a paroled prisoner charged with violation of his parole. Thereupon, such board of parole shall, as soon as practicable, hold a parole court at such prison and consider the case of such parole violator, who shall be given an opportunity to appear personally, but not through counsel or others, before such board of parole and explain the charges made against him. The board of parole shall within a reasonable time act upon such charges, and may, if it sees fit, require such prisoner to serve out in prison the balance of the maximum term for which he was originally sentenced calculated from the date of delinquency or such part thereof as it may determine, or impose such punishment as it deems proper, subject to the provisions of the next section. As amended L. 1945, c. 678, §3, eff. July 1, 1945."

APPENDIX B

Affidavit of Arnold Bauman in Opposition

Supreme Court of the State of New York

COUNTY OF NEW YORK

JOSEPH LANZA and SYLVESTER COSENTINO,

Plaintiffs,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,

Defendant.

State of New York }
County of New York } ss.:

ARNOLD BAUMAN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in this State, and am the Chief Counsel of the New York State Joint Legislative Committee on Government Operations (hereinafter "Committee"), one of the defendants in this action. I am also named as a defendant.

2. This affidavit is submitted in opposition to plaintiffs' motion for an injunction *pendente lite* to restrain defendants and "all others associated with them • • • from using or employing the use of certain electronic

recordings containing confidential communications between Joseph Lanza, client and Sylvester Cosentino, attorney". Lanza and Cosentino are the plaintiffs in the action. They seek a declaratory judgment and a permanent injunction.

3. A copy of the order to show cause bringing on this application, signed by Mr. Justice Thomas A. Aurelio, and copies of supporting papers annexed thereto were served upon me on Saturday, April 27, 1957, at 1:45 P.M. at the offices of the Committee.

4. A stay provision contained in the proposed order to show cause appears to have been stricken by Justice Aurelio.

5. Service of the motion papers followed a telephone conversation on Friday, April 26, 1957 between plaintiff Cosentino, who made the call, and myself. The account of that conversation in Mr. Cosentino's moving affidavit (pages 3 and 4) is distorted. Mr. Cosentino stated that he was concerned over the violation of his privilege with respect to a conversation with Lanza. I informed Mr. Cosentino, in substance, that I could not understand his concern, since he was not violating any professional confidence. I told him that use of the recording by the Committee was proper and that such use would not constitute violation by Mr. Cosentino of any professional confidence.

6. The statement made by me to Mr. Cosentino summarizes in part the legal position of defendants. The Committee intends, in the course of its public hearings, to introduce all evidence deemed relevant to the restoration to parole of Joseph Lanza during the month of

February, 1957. Such evidence will include the recording in question and the transcript thereof prepared by the Committee. The recorded and transcribed conversation has been in legal effect, overheard. Accordingly, as defendants' memorandum of law will show, the privilege which may attach to the testimony of either an attorney or a client is inapplicable to conversations overheard by third parties, or to the use of records of the overheard communication.

7. With respect to the recording itself: There is but one recording in the possession of the Committee containing a conversation between plaintiffs Lanza and Cosentino. To the best of my knowledge and belief, based upon conversations with employees of the Division of Parole, it represents the *only* conversation between the two men that was recorded, although Mr. Cosentino visited Lanza at the Sheriff's Westchester County jail on several occasions and talked with him on each occasion.

8. Moreover, I am informed by employees of the Division of Parole that plaintiff Cosentino was not, at the time of the conversation of February 7, 1957, the attorney of plaintiff Lanza. Affidavits to that effect are in the process of preparation and will be submitted to the Court with its permission after argument.

9. Entirely apart from privilege, the preliminary question of jurisdiction of the Court over proceedings of the Committee is dispositive of the motion and action herein. The complaint (pars. First, Third and Fourth) annexed to plaintiffs' moving papers alleges affirmatively and unequivocally the due creation by the Legislature of the

Committee, and its authority to inquire into the matters before it. There is no suggestion and no claim by plaintiffs that the Committee is acting without jurisdiction or in excess of authority. The law is clear, as defendants' memorandum will show, that the Court is without power, under the circumstances, to restrain the Committee or its employees in the performance of duties mandated by the Legislature.

WHEREFORE, it is respectfully requested that plaintiffs' motion be in all respects denied, and the complaint dismissed.

/s/ ARNOLD BAUMAN

(Sworn to April 29, 1957.)

Appendix B

Affidavit of Bertram D. Sarafan

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

BERTRAM D. SARAFAN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of this State, and am the Assistant Chief Counsel of the New York State Joint Legislative Committee on Government Operations (hereinafter "Committee"), one of the defendants herein. I submit this affidavit in connection with the application of plaintiffs for a temporary injunction restraining defendants from making use of a certain recording containing a conversation between Joseph Lanza and Sylvester Cosentino.

2. The recording in question, containing portions of a conversation between said Joseph Lanza and Sylvester Cosentino, is in the possession of the Committee. I have had the recording played repeatedly in my presence over a period of many hours, and am fully familiar with the recorded conversation.

3. In connection with my duties as Assistant Chief Counsel to the Committee I have compared the recording, as played, with a typewritten transcript thereof turned over to the Committee by the New York State Division

of Parole. I have made corrections of and additions to the transcript, in the course of repeated playbacks of the recording, and I have supervised the preparation of a corrected typewritten transcrip. of the said recording. The actual typing was done by ıy secretary, Mildred Spiro, an employee of the Committe. This transcript has been mimeographed for the use of ıe Committee.

4. Upon information and belief, the recording in possession of the Committee, which is the subject of the action and motion herein, was made from a disc in the office of the Chairman of the New York State Board of Parole in Albany. The disc was made from the original recording taken in the Sheriff's Westchester County jail. Accordingly, the Committee's recording is a copy of a copy. The sources of my information and belief are conversations with Robert McGuiness, a member of the Committee's staff who, together with a technician employed by the Committee, made the recording in question at the office of the Chairman of the Board of Parole.

5. It is beyond dispute, therefore, that the recording has been played in the presence of persons not parties to the conversation between plaintiffs Lanza and Cosentino, and that the contents thereof are no longer confidential as between these two persons.

/s/ BERTRAM D. SARAFAN

(Sworn to April 29, 1957.)

Appendix B

Affidavit of Mildred Spiro

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

MILDRED SPIRO, being duly sworn, deposes and says:

1. I am an employee of the New York State Joint Legislative Committee on Government Operations, and the secretary of Bertram D. Sarafan, its Assistant Chief Counsel, I submit this affidavit in connection with the pending application to restrain use by the Committee of a recording containing a certain conversation between Joseph Lanza and Sylvester Cosentino.

2. In the course of my duties I was instructed by Mr. Sarafan to prepare a typewritten transcript of said recording, including a conversation between Joseph Lanza and Sylvester Cosentino, from notes made by Mr. Sarafan correcting and adding to a previously prepared typewritten transcript of the recording. I typed such a transcript, and am familiar with its contents, including that portion which contains the conversation in question.

/s/ MILDRED SPIRO

(Sworn to April 29, 1957.)

Appendix B

Supplemental Affidavit of Boris S. Berkovitch

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York }
County of New York } ss.:

BORIS S. BERKOVITCH, being duly sworn, deposes and says: 1. I am an attorney duly admitted to practice in this State, am Special Counsel to the New York State Joint Legislative Committee on Government Operations, and the attorney for defendants in the within action.

2. I submit this affidavit pursuant to the ruling of the Court that all additional papers in the motion argued today, April 29, 1957, at Special Term, Park III, be submitted by 4:00 P.M.

3. Counsel for plaintiffs submitted an unsworn statement of plaintiff Lanza in connection with the hearing of this motion. It is respectfully submitted that an unsworn statement should be disregarded in any event, and most particulary when its source is a presently incarcerated convict, as is the case.

4. Submitted herewith are affidavits of John L. Clark, Abe Simon, and Frank E. Lawrence, Parole Officers of the New York State Division of Parole. These affidavits

make clear for the record that plaintiff Cosentino was not the attorney for plaintiff Lanza at the time of the conversation in question, nor subsequently.

5. It is respectfully submitted that plaintiffs' motion for injunctive relief should be denied and the complaint dismissed.

BORIS S. BERKOVITCH

(Sworn to April 29, 1957.)

Appendix B

Affidavit of Frank E. Lawrence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

FRANK E. LAWRENCE, being duly sworn, deposes and says:

He is a Parole Officer of the New York State Division of Parole assigned to the New York Area Office of the Division of Parole. For some time prior to February 5, 1957, the parolee Joseph "Socks" Lanza was under the supervision of Parole Officer John L. Clark.

On the night of February 5, 1957, your deponent, accompanied by Parole Officers John L. Clark, John J. McCarthy and Abe Simon went to Lanza's apartment at 300 West 23rd Street, New York, N. Y. in order to execute a warrant for the arrest of Lanza because of a violation of parole. The Parole Officers found the parolee Lanza and his wife, Ellen Lanza in the apartment.

Shortly after the Parole Officers entered the apartment, your deponent overheard Mrs. Lanza ask Joseph Lanza what was it all about (indicating the visit of the Parole Officers and overheard Lanza reply it was nothing, that Mr. Clark wanted to see him for a couple of minutes. Your deponent then overheard Mrs. Lanza ask Joseph Lanza if she should call "Sylvester" and Lanza replied that she should not, that they should see what this is.

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Your deponent overheard Joseph Lanza ask Parole Officer Clark if he could come to the latter's office the next morning to discuss the matter. Clark informed Lanza that he was to be taken into custody that night.

The Parole Officers remained in the apartment for more than two hours searching the premises. Near the close of this period your deponent overheard Mrs. Lanza again ask Lanza if she should call "Sylvester" and Lanza replied that if it would make her feel better, to do so.

After leaving the apartment, the Parole Officers took Lanza, by automobile, to the Sheriff's Westchester County Jail at East View, New York. En route, your deponent asked Lanza who "Sylvester" was and Lanza replied that "Sylvester" was a friend of the family, his wife's lawyer.

On February 7, 1957, your deponent, accompanied by Parole Officers Simon and Clark, took Lanza by automobile, from the Sheriff's Westchester County Jail to Long Beach, New York. En route, your deponent asked Lanza who "Cosentino" was and Lanza replied that he was a friend of the family, his wife's attorney, that he (Cosentino) was not going to get paid and, in fact, would not take any money. Lanza added it made his wife feel good to talk to Cosentino. Finally, Lanza stated that he was "not fighting this" (the parole violation proceedings), that he was going to cooperate with the parole authorities and not fight the proceedings, although he could.

On February 16, 1957 the deponent accompanied by Parole Officers Clark and Simon interviewed Lanza who was still incarcerated at the Sheriff's Westchester County Jail. Parole Officer Clark asked Lanza if "Sylvester"

was Lanza's attorney. Lanza replied, "I told you he wasn't".

As a result of the foregoing, your deponent has at all times had the understanding and conclusion that Sylvester Cosentino was never Joseph Lanza's lawyer.

FRANK E. LAWRENCE

(Sworn to April 26, 1957.)

Appendix B

Affidavit of Abe Simon

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York }
County of New York } ss.:

ABE SIMON, being duly sworn deposes and says:

He is a Parole Officer of the New York State Division of Parole assigned to the New York Area Office of the Division of Parole. For some time prior to February 5, 1957, the parolee Joseph "Socks" Lanza was under the supervision of Parole Officer John L. Clark.

On the night of February 5, 1957, your deponent, accompanied by Parole Officers Frank E. Lawrence, John J. McCarthy and John L. Clark went to Lanza's apartment at 300 West 23rd Street, New York, N. Y., in order to execute a warrant for the arrest of Lanza because of a violation of parole. The Parole Officers found the parolee Lanza and his wife, Ellen Lanza in the apartment.

Shortly after the Parole Officers entered the apartment, your deponent overheard Mrs. Lanza ask Joseph Lanza what was it all about (indicating the visit of the Parole Officers) and overheard Lanza reply that it was nothing, that Mr. Clark wanted to see him for a couple of minutes. Your deponent then overheard Mrs. Lanza ask Joseph Lanza if she should call "Sylvester" and Lanza reply that she should not, that they should see what this is.

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Your deponent overheard Joseph Lanza ask Parole Officer Clark if he could come to the latter's office the next morning to discuss the matter. Clark informed Lanza that he was to be taken into custody that night.

The Parole Officers remained in the apartment for more than two hours searching the premises. Near the close of this period your deponent overheard Mrs. Lanza again ask Lanza if she should call "Sylvester" and Lanza reply that if it would make her feel better, to do so.

After leaving the apartment, the Parole Officer took Lanza, by automobile, to the Sheriff's Westchester County Jail at East View, New York. En route, your deponent overheard Parole Officer Lawrence ask Lanza who "Sylvester" was and Lanza reply that "Sylvester" was a friend of the family, his wife's lawyer.

On February 7, 1957, your deponent, accompanied by Parole Officers Clark and Lawrence, took Lanza, by automobile, from the Sheriff's Westchester County Jail to Long Beach, New York. En route, your deponent overheard Parole Officer Lawrence again ask Lanza who "Cosentino" was and Lanza reply that he was a friend of the family, his wife's attorney, that he (Cosentino) was not going to get paid and, in fact, would not take any money. Lanza added it made his wife feel good to talk to Cosentino. Finally, Lanza stated that he was "not fighting this" (the parole violation preceedings), that he was going to cooperate with the parole authorities and not fight the proceedings although he could.

On February 16, 1957, the deponent, accompanied by Parole Officers Clark and Lawrence, interviewed Lanza who was still incarcerated at the Sheriff's Westchester

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County Jail. Parole Officer Clark asked Lanza if "Sylvester" was Lanza's attorney. Lanza replied, "I told you he wasn't."

As a result of the foregoing, your deponent has at all times had the understanding and conclusion that Sylvester Cosentino was never Joseph Lanza's lawyer.

ABE SIMON

(Sworn to April 26, 1957.)

Appendix B

Affidavit of John L. Clark

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

State of New York
County of New York } ss.:

JOHN L. CLARK, being duly sworn, deposes and says:

He is a Parole Officer of the New York State Division of Parole assigned to the New York Area Office of the Division of Parole. For some time prior to February 5, 1957, the parolee Joseph "Socks" Lanza was under his supervision.

On the night of February 5, 1957 your deponent, accompanied by Parole Officers Frank E. Lawrence, John J. McCarthy and Abe Simon went to Lanza's apartment at 300 West 23rd Street, New York, N. Y. in order to execute a warrant for the arrest of Lanza because of a violation of parole. The Parole Officers found the parolee Lanza and his wife, Ellen Lanza in the apartment.

Shortly after the Parole Officers entered the apartment, your deponent overheard Mrs. Lanza ask Joseph Lanza what was it all about (indicating the visit of the Parole Officers) and overheard Lanza reply it was nothing, that Mr. Clark wanted to see him for a couple of minutes. Your deponent then overheard Mrs. Lanza ask Joseph Lanza if she should call "Sylvester" and Lanza reply that she should not, that they should see what this is.

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Joseph Lanza asked your deponent if he could come to the latter's office the next morning to discuss the matter. Your deponent informed him that he was to be taken into custody that night.

The Parole Officers remained in the apartment for more than two hours searching the premises. Near the close of this period your deponent overheard Mrs. Lanza again ask Lanza if she should call "Sylvester" and Lanza reply that if it would make her feel better, to do so.

After leaving the apartment, the Parole Officers took Lanza, by automobile, to the Sheriff's Westchester County Jail at East View, New York. En route, your deponent overheard Parole Officer Lawrence ask Lanza who "Sylvester" was and Lanza reply that "Sylvester" was a friend of the family, his wife's lawyer.

On February 7, 1957, your deponent, accompanied by Parole Officers Simon and Lawrence, took Lanza, by automobile, from the Sheriff's Westchester County Jail to Long Beach, New York. En route, your deponent overheard Parole Officer Lawrence ask Lanza who "Cosentino" was and Lanza reply that he was a friend of the family, his wife's attorney, that he (Cosentino) was not going to get paid and, in fact, would not take any money. Lanza added it made his wife feel good to talk to Cosentino. Finally, Lanza stated that he was "not fighting this" (the parole violation proceedings), that he was going to cooperate with the parole authorities and not fight the proceedings although he could.

On February 16, 1957, the deponent accompanied by Parole Officers Lawrence and Simon, interviewed Lanza who was still incarcerated at the Sheriff's Westchester

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County Jail. Your deponent asked Lanza if "Sylvester" was Lanza's attorney. Lanza replied, "I told you he wasn't".

On February 19, 1957 Mrs. Lanza, accompanied by Sylvester Cosentino, appeared at your deponent's office at 320 Broadway, New York, N. Y., at your deponent's request, to be interviewed about her husband's affairs. In the course of the interview, either Mrs. Lanza or Mr. Cosentino, in the presence of the other, stated to your deponent in substance and effect that Mr. Cosentino was not Joseph Lanza's lawyer and was merely accompanying and helping Mrs. Lanza at the interview. (Your deponent cannot recall which one so stated.)

As a result of the foregoing, your deponent has at all times had the understanding and conclusion that Sylvester Cosentino was never Joseph Lanza's lawyer.

JOHN L. CLARK

(Sworn to April 26, 1957.)